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SUPREME COURT, U.S.

NO. 88-2129

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY

PETITIONER

versus

WESLEY N. TURNER, III

RESPONDENT

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The respondent, Wesley N. Turner, III, respectfully moves the Court to allow him to proceed herein in forma pauperis, and files herewith his affidavit in support of this motion. The respondent further states that leave to proceed in forma pauperis was not sought in any court below.

WESLEY N. TURNER, III, PRO SE
1813 CHATSWORTH DRIVE
UNIT B
LEXINGTON, KENTUCKY 40505
TELEPHONE: (606) 293-0417

October Term 1988

NO. 88-2129

IN THE
SUPREME COURT OF THE UNITES STATES

COMMONWEALTH OF KENTUCKY

PETITIONER

versus

WESLEY N. TURNER,III

RESPONDENT

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Wesley N. Turner, III, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed herein without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of this case are true.

1. Are you presently employed?

Answer: Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Answer: $1,200.00 per month gross, $900.00 per month net. Wesley Turner, Jr., 3447 Southerland Drive, Lexington, Ky 40517 and Gary Jones, 500 Curd Lane, Wilmore, Kentucky 40390.

2. Have you received within the past twelve months any income from a business,profession or other form of self-employment or in the form of rent,property, interest, dividends, or other source?

Answer: No, other than set out above.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: Not applicable.

3. Do you own any cash or checking or savings account?

Answer: No.

a. If the answer is yes, state the total value of the items owned.

Answer: Not applicable.

4. Do you own any real estate. stock, bonds, notes, automobile, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: Yes.

a. If the snswer is yes, describe the property and state its approximate value.

Answer: A 1986 Pontiac car valued at approximately $7,000.00 with a debt against same of approximately $6,500.00; a 1977 Dodge van valued at approximately $600.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: No one is dependent upon me for support at this time.

I understand that a false statement or answer to any questions in this affidavit will subject to penalties for perjury.

WESLEY N. TURNER, III

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

Subscribed andsworn to before me this September 11, 1989, by WESLEY N. TURNER, III.

My commission expires August 9, 1990.

NOTARY PUBLIC, STATE AT LARGE, KENTUCKY.

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

I, Wesley N. Turner, III, after first being duly sworn, stste that I have served a true copy of the foregoing on counsel for the petitioner by first class mail, postage prepaid, at the following address:

Hon. John S. Gillig
Assistant Attorney General
Commonwealth of Kentucky
State Capitol Building
Frankfort, Kentucky 40601

this September 11, 1989, and that all parties have been served as required by Supreme Court Rules.

WESLEY N. TURNER, III

Subscribed and sworn to before me this September 11, 1989, by WESLEY N. TURNER, III.

My commission expires August 9, 1990.

NOTARY PUBLIC, STATE AT LARGE, KENTUCKY.

NO. 88-2129

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY

PETITIONER

versus

WESLEY N. TURNER, III

RESPONDENT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Wesley N. Turner, III Pro Se
1813 Chatsworth Drive
Unit B
Lexington, Kentucky 40505
Telephone: (606) 293-0417

October Term 1988

STATEMENT OF THE CASE

Although the Statement of the Case by the petitioner is basically accepted by the respondent, the respondent wishes to detail some of the extraordinary facts of this case which were merely alluded to by the petitioner.

The petitioner correctly points out that the alleged victim was examined by another physician before Dr. Tackett, the expert witness for petitioner who eventually testified at the trial. It should be pointed out, however, that the petitioner had had the child examined by a gynecologist, Dr. Lewis, on June 22, 1987, approximately ten to seventeen days after the alleged rape allegedly occurred. Dr. Lewis found two transections. On August 6, 1987, when Dr. Tackett examined the child, she found four transections. The respondent never saw the child after June 12, 1987. Consequently, there is a critical variance between the findings of the petitioner's own experts.

The petitioner also correctly points out that the respondent testified that the criminal charges were an attempt by his former wife to gain complete custody of the child. Yet the mother of the child testified that during the divorce proceedings between her and the respondent, she took the child to a doctor, claiming she had been sexually abused, and that the exam showed no evidence of sexual assault. TE 103 and 104. She then admitted making another claim of abuse at the time she brought a contempt motion to compel the respondent to pay some bills, and the divorce court refused to restrict respondent's visitation. She further testified that she accused the respondent of whipping the child with a belt, and that social workers investigated and reported they did not feel it could possibly have happened. TE at 107 and 108.

The Kentucky Supreme Court in its decision stated: "In these circumstances and limited to the facts of this case, we hold that appellant, as a matter of due process and fairness, was entitled at least to have the...victim examined by an independent gynecologist...."

REASONS FOR DENYING THE WRIT

1. The Supreme Court of Kentucky considered all the issues and correctly decided them. In its opinion the Court stated that "the physical condition of an alleged victim may, in itself, negate the fact that a particular crime has been committed. In a case such as this the critical question is whether the evidence sought by the appellant is of such importance to his defense that it outweighs the potential for harm caused by the invasion of the alleged victim's privacy...." The Court went on to say that "a physical examination of the four-year-old child might have disclosed evidence to completely refute the charge".

2. The questions put forth by the petitioner were not raised or preserved by the petitioner in the Supreme Court of Kentucky. The Court, in limiting its holding to the facts of this case, held in effect that the trial court abused its discretion afforded it by the Kentucky Rules of Criminal Procedure in denying the respondent's motion for an additional examination by a qualified expert.

3. The cases relied on by the petitioner in support of its contention are clearly distinguishable from this case on the facts.

4. The Court below, in its holding, did not address Sixth Amendment confrontation concerns, because the Court fully considered this as a separate issue and refused to reverse on the confrontation issue.

5. A physical examination of the child in this case is not so obtrusive or objectionable so as to trigger Fourth Amendment protections.

6. The decision of the Supreme Court of Kentucky is not in conflict with most states because most cases hold that such examinations are discretionary and require a showing of necessity. The necessity in this case is the need to resolve the conflicting findings of the petitioner's two experts and to allow the respondent to determine independently that the tears in the alleged

victim's hymenal ring actually existed and the nature of the tears. Otherwise, it would be impossible for the respondent to place their existence and nature in dispute.

7. An examination by a qualified and independent expert will have the same probative value as did the petitioner's own experts' examinations. The petitioner's expert testified that the tears could have occurred as long as six months before her examination.

8. The decision of the Court below rests on the proposition that the aim in every trial should be to decipher the truth, and that technological advances in the field of child sexual abuse should be available to an accused as well as to an alleged victim, especially where the examination is relatively unobtrusive, there is conflicting evidence, the penalties for the crime are severe, the clarity of the testimony of the alleged victim is slight, and such examinations can be done under the control of the trial court. Certainly these are the independent and adequate state grounds upon which the Court below rested its holding in this case.

9. The holding below raises no federal question to be decided on certiorari, nor did the Supreme Court of Kentucky believe that the federal law required it to decide the case the way it did.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Wesley N. Turner, III, Pro Se

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

I, Wesley N. Turner, III, after first being duly sworn, stste that I have served a true copy of the foregoing on counsel for the petitioner by first class mail, postage prepaid, at the following address:

Hon.John S. Gillig
Assistant Attorney General
Commonwealth of Kentucky
State Capitol Building
Frankfort, Kentucky 40601

this September 11, 1989, and that all parties have been served as required by Supreme Court Rules.

WESLEY N. TURNER, III

Subscribed and sworn to before me this September 11, 1989, by WESLEY N. TURNER, III.

My commission expires August 9, 1990.

NOTARY PUBLIC, STATE AT LARGE, KENTUCKY.